



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

December 7, 2017

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Paul Linfield
Association: Fairfax Station Homeowners Association
File Number: 2018-01350

The Office of the Common Interest Community Ombudsman has been designated to review final adverse decisions and determine if they may be in conflict with laws or regulations governing common interest communities. Such determination is within the sole discretion of the Office of the Common Interest Community Ombudsman and not subject to further review.

Complaint

The Complainant submitted a complaint to the Association, dated August 13, 2017. The Association provided a response to the Complainant dated October 17, 2017. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 3, 2017 and received November 7, 2017.

Determination

The Common Interest Community Ombudsman (CICO), as designee of the Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18VAC 48-70-120) The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §55-530(F) (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

Under the Regulations, applicable laws and regulations pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the

association complaint procedure. In the event that such a complaint is submitted to this office as part of a NFAD, a determination cannot be provided.

The Complainant has alleged that the Association has improperly amended the restrictive covenants of the Association by adopting a resolution that the Complainant believes is in violation of the Association's governing documents and sections of the Property Owners' Association Act (§55-513 and §55-515.1). The Complainant asks the Association to rescind the resolution. The resolution was adopted in 2011. A newer resolution was referenced but it has not yet been adopted so cannot be considered in this Determination. The Complainant also alleges that the Association has shown a dereliction of duty in its supervision of the association management company, and alleges the association failed to respond to a request to examine the books and records that was made in October 2015. The Complainant did not include a copy of his original request to the Association.

The Association's response to the Complaint essentially stated that the board of directors did have the power to adopt the resolution, and the power was granted under several different governing documents. The Association did not address the allegation regarding dereliction of duty, which is acceptable since there is no language in common interest community law that addresses or defines dereliction of duty.

The Association did respond to the Complainant's allegation that it had failed to provide copies of books and records more than two years ago by either providing the requested documents, noting that they did not exist, or stating that the information sought was contained in the minutes of the Association. The response appears to comply with the provisions contained under the Property Owners' Association Act (§55-510).

While numerous reasons were provided as to why the resolution was improper and a misuse of the Association's power, the fact that the resolution was adopted more than six years ago takes it well outside the time frame in which a complaint can be submitted to this agency. Under §54.1-307.1 of the Code of Virginia, any complaint must be received "within three years of the act, omission or occurrence giving rise to the violation."

While a Notice of Final Adverse Decision is not referred to as a complaint under common interest community law and regulation, it is submitted to this office because someone has filed with a complaint with his or her association that alleged a violation of common interest community statutes or regulations and is, in turn, filing with us out of dissatisfaction with the response from the association. A Notice of Final Adverse Decision is a form of complaint and therefore is bound by the provisions contained in §54.1-307.1(A). Because the timeframe for addressing this issue has long passed, I will make no comments or conclusions regarding the portion of the Complaint related to the resolution.

Because of the limitation on filing a complaint with this agency, the resolution matter will remain unresolved. There is no language in common interest community law or regulations that speaks to a dereliction of duty on the part of a board of directors, so no determination will be provided regarding that allegation. Finally, the Association did respond to the request to examine certain records of the association and the response appears to comply with the law.

Required Actions

No action is required.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Gillespie". The signature is written in a cursive style with a large, looping initial "H".

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Fairfax Station Homeowners Association